No. 80-819

In The

Supreme Court of the United States

October Term, 1980

THE BRISTOL SPRING MANUFACTURING CO.
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR UAW LOCAL 1251

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QUESTIONS PRESENTED

1. Did the court of appeals and the Board use a subjective rather than a tendency to influence standard in determining whether Union payments to employees for giving statements in aid of an unfair labor practice investigation improperly influenced a representation election?

2. Did the court of appeals err in ruling that substantial evidence supported the Board's finding that Union payments to employees for such purpose did not, and were not intended to, interfere with the employees' free choice in an election?

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1251,[1] by counsel, respectfully prays that the Court deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unreported (Pet. App. 1a-3a). The court of appeals enforced a Labor Board Supplemental Decision and Order, 247 NLRB No. 34 (1980) (Pet. App. 1b-13b) entered, after an evidentiary hearing, on remand from a decision of the court, 579 F.2d 704 (2d Cir. 1978) (Pet. App. 1c-6c), declining to enforce a prior decision of the Labor Board, 231 NLRB 568 (1977) (Pet. App. 1d-14d).

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1. Hereafter referred to as the "Union." As the charging party before the Board, the Union was permitted to intervene in the enforcement proceeding in the court of appeals.

STATEMENT

On April 2, 1976, the Board conducted a representation election among the Company's production and maintenance employees. The vote was 43 to 36 in favor of the UAW, with 7 ballots challenged; later the parties stipulated that one of the employees who cast a challenged ballot had been ineligible to vote, thus establishing a Union majority.

The Company filed objections to the election alleging, among other things, that the Union had interfered with the election by "financial inducements to employees to demonstrate their support" for the Union. After an administrative investigation by the Regional Director, the Board overruled the objections and certified the Union. Following the Company's refusal to bargain with the Union, the Labor Board, on motion for summary

judgment, issued its decision requiring the Company to honor the certification and bargain with the Union. However, because the Company's objection concerning Union payments to employees raised "substantial and material factual issues," the court of appeals remanded the case to the Board for a hearing on "the purpose and effect" of such payments.

On remand, an Administrative Law Judge, on the basis of detailed findings of fact entered after a full evidentiary hearing, specifically determined that the payments in question were neither intended to affect the outcome of the election nor did they have a tendency to interfere with the results of such election (Pet. App. 10b-11b). The Board affirmed the Administrative Law Judge's findings and his ultimate conclusion that the Union's

conduct did not, and was not intended to, interfere with the employees' free choice in an election (Pet. App. 2b). It reissued the order to bargain.

The facts found by the Administrative Law Judge and adopted by the Board show that the challenged payments were made solely to compensate employees for the time and inconvenience of giving written statements in support of an unfair labor practice charge regarding the alleged discriminatory discharge of two employees. Five employees received $5 each on February 20, 1976 for giving such statements to a Board agent during their lunch period and after working hours on the preceding day. Similar payments were made to four employees who, on March 3, 1976, gave statements after working hours to a Union representative for forwarding to a Board agent. They had expected to

give such statements to a Board agent who did not appear, although they waited for him. Two days afterward, by a clerical error, the Union issued checks to these employees for $20 instead of $5 as requisitioned.

Before giving the statements, the employees were not informed by the Union that they would be compensated. The payments were not linked to supporting or voting for the Union. At the time, pieceworkers' straight time hourly earnings ranged up to about $4 an hour, although at least one employee involved averaged $4.65 an hour.

The Administrative Law Judge found that the purpose of the payments was proper. In summarizing the evidence, he declared:

> "In the final analysis, however, the test of interference is an objective one, that is the tendency of the conduct in question

> to interfere with the results of an election. In my judgment, on the facts of this case, I find that the payments had no such tendency" (Pet. App. 11b).

After finding no impropriety in the $5 payments, the Administrative Law Judge also found that the $20 payments, even if disproportionate, were not objectionable in the light of their purpose, the recipients' understanding of that purpose, and the fact that such payments took place four weeks before the election.

The Board rejected any implication in the Administrative Law Judge's discussion that the $20 payments may have been excessive or unreasonable. It concluded that the evidence failed to establish that, as the Company asserted, the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union (Pet. App. 4b).

The Board also disagreed with the Administrative Law Judge's statement that N.L.R.B. v. Savair Manufacturing Co., 414 U.S. 270 (1973), was inapplicable because it dealt only with inducements expressly intended to influence voters, but it added:

> "As the Administrative Law Judge's treatment of the effects of the payments actually conforms to the standards set out in Savair, we do not disturb his conclusion" (Pet. App. 4b).

The court of appeals (two of whose members sat on the panel that had remanded the matter earlier) enforced the Board's supplemental bargaining order. It reasoned that the Board has wide discretion in the conduct of representation elections; that whether preelection payments interfere with such elections must be determined, not by a per se rule, but as a question of fact; and that in view of the salient facts

found by the Board, its conclusion that the Union's conduct did not affect the election was supported by substantial evidence (Pet. App. 1a-3a).

ARGUMENT

The petitioner contends there are two reasons warranting review by this Court. First, it argues that the Board and the court of appeals improperly used a subjective rather than an objective test in determining whether payments by the Union interfered with the election.

Second, the petitioner asserts that the payments to employees were so grossly disproportionate to their normal wages that they tended to destroy the standards required for a fair election.

Neither of these contentions has validity. Both the Board and the court of appeals did apply the objective test for which petitioner contends, searching out not only the purpose of the payments but their likely effect, if any, on the election. Both the Board and the court of appeals correctly took the view that

whether pre-election payments have the effect of interfering with freedom of choice is a question of fact. In the light of all the facts, the Board found that the Union's conduct in making the payments did not, and was not intended to, interfere with the employees' free choice in the election and the court of appeals concluded that the Board's decision was supported by "substantial evidence" in the record. Because the court of appeals and the Board correctly applied well established legal principles, further review is not warranted.

1. Petitioner asserts that the decision of the Board and the court below conflict with Savair, supra, and rulings by the Fourth and Sixth Circuits, respectively in Collins & Aikman Corp. v. N.L.R.B., 383 F.2d 722 (4th Cir. 1967) and Plastic Masters, Inc. v. N.L.R.B.,

512 F.2d 449 (6th Cir. 1975). It says that, under these decisions, the appropriate test was "whether the conduct has a tendency to influence the election" (Pet. 4), and this test was disregarded both by the Board and the court of appeals.

The argument rests on an assumption that is contrary to fact. The "tendency to influence test" was applied at each level of adjudication. The Administrative Law Judge specifically found, on the facts of this case, that the payments in question had no tendency to interfere with the results of the election. While he deemed Savair inapplicable on the facts, he did not disagree with its principle. The Board disapproved of the Administrative Law Judge's statement on Savair but adopted his conclusion that the payments did not affect the results

of the election, since his treatment of the effects of the payments actually conformed to the standard set out in Savair. The court of appeals sustained the Board's decision.

As the Fifth Circuit stated in N.L.R.B. v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978), the "tendency to influence test requires an examination of the challenged action in light of all the relevant facts." Exactly such an examination led in the present case to the conclusion that no interference with free choice took place.

There is no conflict between the decision of the court of appeals and the decisions of this Court in Savair, of the Fourth Circuit in Collins & Aikman, and of the Sixth Circuit in Plastic Masters. Accord: Kustom Electronics, Inc. v. N.L.R.B., 590 F.2d 817 (10th Cir. 1978);

N.L.R.B. v. Commercial Letter, Inc., 455 F.2d 109 (8th Cir. 1972); 496 F.2d 35 (8th Cir. 1974); N.L.R.B. v. Basic Wire Products, Inc., 516 F.2d 261 (6th Cir. 1975).

2. Ignoring all other circumstances in the case, the petitioner argues that disparity between the employees' normal earnings and the payments of $20 tended to influence the election improperly.[2] This contention, too, does not warrant review.

The Board and the court of appeals correctly denied the petitioner's contention. The Board disclaimed the position that payments to employees must bear an exact correspondence to wages lost or expenses incurred. It found that

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2. To produce the alleged disparity, petitioner calculated normal earnings as equal to the incentive workers' base rate of $2.31 per hour (Pet. 3).

the time involved amounted to as much as three hours, that it took place after work, that it caused inconvenience to the employees, that the purpose of the payments was for time spent by the recipients in giving statements in aid of an investigation of unfair labor practice charges, and that both the recipients and their fellow employees understood that this was the purpose. Responding to one of petitioner's claims based on Savair, the Board concluded that the evidence failed to establish that the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union.

The court of appeals found it significant that the actual purpose of the payments was generally understood, that such payments were not viewed as an inducement to vote for the Union, and

that the checks were distributed one month before the election.

Where a court of appeals has concluded that the Board's decision is supported by substantial evidence, there is rarely need for this Court to intervene. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490-91 (1951). No such need exists here.

The present case is distinguishable from Savair, supra, in which this Court held that a union's waiver of initiation fees for employees who signed authorization cards before a Board election constituted interference with the election. The facts in this case differ, too, from those in Collins & Aikman, supra, and Plastic Masters, supra. In both those cases employees were paid excessive and unreasonable amounts of money to act as observers for the Union in an election.

In each case the facts supported the conclusion that the Union had bought the endorsement of an influential employee who appeared at the polling place. Here the Union paid neither for support nor endorsement, but simply compensated employees for their assistance in a Board investigation.

This case presents no important question of federal policy. Inasmuch as the overpayments stemmed from a clerical error, the situation is unique and unlikely to be repeated. Indeed, the only issue of federal policy concerns intolerable delay. Under the banner of fairness in representation elections, petitioner has taken advantage of a harmless mistake to frustrate its employees' choice of a bargaining agent for over four and one-half years. No sound reason exists for postponing further the employees' exercise of their bargaining rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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